

Florida State University Law Review

Volume 37 | Issue 1

Article 5

2009

We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters

Terin M. Barbas
gn@m.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

Recommended Citation

Terin M. Barbas, *We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters*, 37 Fla. St. U. L. Rev. (2009) .
<http://ir.law.fsu.edu/lr/vol37/iss1/5>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



WE COUNT TOO!
ENDING THE DISENFRANCHISEMENT
OF LIMITED ENGLISH PROFICIENCY VOTERS

Terin M. Barbas

VOLUME 37

FALL 2009

NUMBER 1

Recommended citation: Terin M. Barbas, *We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters*, 37 FLA. ST. U. L. REV. 189 (2009).

NOTE

WE COUNT TOO! ENDING THE DISENFRANCHISEMENT OF LIMITED ENGLISH PROFICIENCY VOTERS

TERIN M. BARBAS*

ABSTRACT

The Voting Rights Act fails to protect the voting rights of nearly five million American citizens by only providing voting assistance to four language groups, despite the over three hundred different languages spoken in the United States. By not assisting all limited English proficient (LEP) American citizens, the Voting Rights Act disenfranchises whole communities from the voting process. All American citizens should have the opportunity to vote, and Congress should ensure that all citizens can vote effectively.

This Note proposes an amendment to section 208 of the Voting Rights Act that would allow LEP American citizens to bring an assistant of their choice into the voting booth on Election Day. It then explores the shortcomings of the Voting Rights Act and the problems states have encountered when trying to respond to those problems. The proposed amendment would rejuvenate the right to vote in limited English-speaking communities, while halting discriminatory voting practices that target limited English-speaking voters. While others have proposed remedies to address LEP voter disenfranchisement, this Article is the first legislative solution that would increase voter participation nationwide, increase minority representation, facilitate greater minority assimilation into American society, and decrease election costs.

I. INTRODUCTION.....	190
II. CURRENT LANGUAGE OF THE VOTING RIGHTS ACT (VRA) AND ITS PROBLEMS .	193
A. Section 203 of the VRA.....	194
B. Section 208 of the VRA.....	195
C. States' Reactions to the VRA Language Provisions	195
1. Election Officials Fail to Meet VRA Standards.....	197
2. Relying on Poll Workers Does Not Meet VRA Standards.....	200
III. GOING BEYOND THE EXISTING VRA—AMENDING SECTION 208	201
A. Changing Demographics Require Cost-Efficient Action	202
B. Wording of Section 208 Amendment.....	204
D. Potential Criticisms of the Amendment	209
1. English Language Supporters	210
2. Possible Burdens on LEP American Citizens	212
3. Potential Voter Fraud.....	212
4. Loss of Anonymity.....	213
IV. CONCLUSION	214

* J.D., Florida State University, College of Law, 2010; M.B.A., Florida State University, College of Business, 2010; B.B.A., Marketing, University of Notre Dame, 2007. For their helpful comments and guidance on earlier drafts, the author wishes to thank Professor Michael Dimino, Professor C.J. Weinman, Jacob T. Cremer, and Matthew Beville. Please direct any questions or comments to Terin.Barbas@gmail.com.

I. INTRODUCTION

*No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.*¹

—Justice Black (1964)

Imagine that on Election Day, Franz went to the polls for the first time. Although he is a senior citizen, Franz only recently became an American citizen, after living in the United States for over twenty-five years. Franz, a Haitian immigrant, moved to the United States shortly after completing high school in Haiti. Once in Florida, Franz established a successful grocery store in a predominantly Haitian community. Over the last year, he followed the Creole-Haitian news station's coverage of the various candidates and amendments, and he was excited to be voting in a swing state. When inside the polling booth, Franz began to slowly parse the names and constitutional amendments. Despite Franz's ability to communicate with the English-speaking customers in his store, he was unable to comprehend the instructions or amendments. When he asked a poll worker for assistance, he was told to "figure it out." As a result, the ballot Franz submitted contained several errors. Despite his education and his grasp of conversational English, Franz was unable to understand the ballot or its instructions as well as if it had been written in Creole. Consequently, Franz became one of many disenfranchised limited English proficiency (LEP)² American citizens because of a lack of bilingual assistance at the polls.³

Despite the current Voting Rights Act (VRA) language provisions, which require language assistance for some non-English speakers, situations such as Franz's occur each election. Thus, the current provisions, sections 203 and 208, are insufficient to protect LEP American citizens.⁴ Section 203 only requires certain jurisdictions to make

1. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

2. LEP citizens are those who speak English less than "very well" and need assistance to effectively participate in the political process. Congress defined LEP in the Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, § 2, 106 Stat. 921, 922 (codified as 42 U.S.C. § 1973aa-1a (2006)). *See also* U.S. CENSUS BUREAU, Language Use, http://www.census.gov/population/www/socdemo/lang_use.html (last visited Oct. 27, 2009) ("Language Use, English Ability, and Linguistic Isolation data were collected in the 2000, 1990, and 1980 decennial censuses using a three-part series of questions: A. Does this person speak a language other than English at home? (For those who speak another language) B. What is this language? C. How well does this person speak English? —*very well, well, not well, not at all.*" (emphasis added)).

3. Franz exists only in this hypothetical; however, as will be shown, his story is representative of many Americans.

4. *See, e.g.*, ASIAN AM. LEGAL DEF. AND EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2004 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT

language assistance available at polling locations to American Indians, Asian Americans, Alaskans, and Hispanics with limited English proficiency. A community with one of these language groups will qualify for language assistance if it meets minimum thresholds of population and illiteracy.⁵ Section 208 of the VRA only aids voters who require assistance because of “blindness, disability, or inability to read or write” by permitting each to enter the polling booth with an assistant of his or her choice.⁶

LEP American citizens need language assistance when voting. According to 2006 census data, nearly 10% of the American population speaks English less than “[v]ery [w]ell”; in some states, such as California, the number is as high as 20%.⁷ Despite this, section 203 leaves nearly five million American citizens without a voice in the electoral process because the VRA does not require their counties to provide bilingual assistance.⁸ The 2000 presidential election was decided by a mere 537 votes in Florida, a state with a population that is 12% LEP.⁹ With roughly five million LEP voters unable to fully exercise their voting rights, increased LEP participation could easily change close elections.¹⁰

Currently, the limitations of the VRA disenfranchise whole communities from their greatest democratic liberty—the right to vote. For example, Michigan was in a similar position to Florida in the 2000 election; 30% of the population in Dearborn, Michigan is Arab, but no electoral materials or assistance are provided to Arabic-speaking Americans under the VRA.¹¹ Thus, despite Michigan’s posi-

AND HELP AMERICA VOTE ACT (HAVA) IN NY, NJ, MA, RI, MI, IL, PA, VA (2005), *available at* http://www.aaldef.org/articles/2005-08-18_189_AsianAmericanA.pdf.

5. See 42 U.S.C. § 1973aa-1a (2006).

6. *Id.* § 1973aa-6.

7. U.S. CENSUS BUREAU, *Percent of People Who Speak English Less than “Very Well,”* http://factfinder.census.gov/servlet/GRTTable?_bm=y&-_box_head_nbr=R1603&-ds_name=ACS_2006_EST_G00_-format=US-30 (last visited Oct. 27, 2009).

8. See U.S. CENSUS BUREAU, *Language Spoken at Home for the Citizen Population 18 Years and Over Who Speak English Less than “Very Well”* (2000), *available at* http://www.census.gov/population/www/socdemo/lang_use.html.

9. Stuart Gorin, *Presidential Race Statistical Tie in Swing State Florida*, AMERICA.GOV, Sept. 10, 2008, <http://www.america.gov/st/elections08-english/2008/September/20080910185610snirog7.575625e-02.html>; U.S. CENSUS BUREAU, *Percent of People Who Speak English Less than “Very Well,”* *supra* note 7.

10. See U.S. CENSUS BUREAU, *supra* note 8. Calculation of five million LEP Voters was based on taking the total number of U.S. Citizens who speak English less than “Very Well” (2000) and subtracting the “Speak Spanish or Spanish Creole” and “Speak Asian or Pacific Island Language” amounts so that noncovered languages would remain. The estimate was rounded up because Pacific Island languages are not covered by the VRA, and as this Note will demonstrate, even voters who speak those covered languages are not always able to fully exercise their voting rights.

11. G. Patricia de la Cruz & Angela Brittingham, *The Arab Population: 2000*, U.S. CENSUS BUREAU, at 7 (Dec. 2003), *available at* <http://www.census.gov/prod/2003pubs/c2kbr-23.pdf>.

tion as a swing state in the 2008 election, a whole community was underrepresented.¹² This infringes on LEP American citizens' ability to comprehend the ballot and fully participate in the voting process—a right many English-speaking voters take for granted. Once the right to vote has been conferred, a “[s]tate may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”¹³

In a democratic society, the right to vote is the greatest liberty, and Congress should ensure that all citizens can vote effectively. But having the right to vote is meaningless if entire communities, such as those comprised predominantly of LEP American citizens, cannot accurately cast their ballots. The current minority VRA language assistance provisions do not meet the needs of LEP American citizens because they only cover four of the hundreds of language groups in the United States.¹⁴ Given the melting pot of cultures and languages in the United States, something must be done to remedy the VRA’s shortcomings and to empower LEP American citizens to vote. Although a voter may be well informed about issues and candidates, language assistance is still necessary to ensure that LEP Americans can accurately cast their votes.¹⁵ Thus, Congress should amend section 208 of the VRA to include LEP American citizens who require assistance through the following italicized language:

*Any voter who requires assistance to vote by reason of blindness, disability, inability to read or write, or limited English proficiency may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.*¹⁶

Congress should then add the following language to identify LEP American citizens:

*Voters are considered to have limited English proficiency (LEP) if they speak English less than “very well” under the standards of the U.S. Census Bureau and need assistance to effectively participate in the political process.*¹⁷ *For the purposes of section 208, voters who*

12. See Susan Page, *New Swing States Pop Up in '08*, USA TODAY, May 28, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-05-27-Newmap_N.htm.

13. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

14. See 42 U.S.C. § 1973aa-1a (2006); see also JoNel Newman, *Ensuring that Florida’s Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 330-31 (2007) (discussing the “sizable gaps in the scope of the [Voting Rights] Act’s protections for language minorities.”).

15. Karen K. Naraski & Terry M. Ao, *Meeting the Demand of a Growing Language-Minority Voting Populate*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 41, 47 (Benjamin E. Griffith ed., Am. Bar Ass’n 2008).

16. See 42 U.S.C. § 1973aa-6. Italicized words indicate the proposed changes to the current statute.

17. See *id.* § 1973aa-1a(b)(3)(B); James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the*

consider themselves more effective in reading, writing, or speaking a language other than English and need assistance to effectively participate in the political process are also considered to have LEP.

This amendment rejuvenates the right to vote in non-English-speaking communities through a proactive approach by permitting LEP American citizens to bring assistants with them to the polls. Accordingly, LEP voters would be in control of whether they receive assistance, minimizing the adverse effects that ill-informed or hostile election officials can have on the process.

This Note explores the inadequacies of the current language provisions that protect LEP American citizens during the electoral process. It examines the existing sections of the VRA dedicated to protecting the votes of non-English-speaking citizens and then explores the problems states have encountered when trying to respond to the VRA's shortcomings. It also shows the failures of election officials and poll workers in upholding the existing VRA. The proposed solution, amending section 208 of the VRA, empowers LEP American citizens nationwide to take matters into their own hands. The amended section 208 would give a voice to citizens like Franz and the Arab-American voters in Michigan, all of whom have no voice as the VRA currently reads. While practical solutions have been suggested to remedy the problem of LEP voter disenfranchisement, this Note is the first to propose a legislative solution that would result in increased voter participation nationwide, increased minority representation, greater minority assimilation into American society, and decreased election costs.

II. CURRENT LANGUAGE OF THE VOTING RIGHTS ACT (VRA) AND ITS PROBLEMS

*The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.*¹⁸

—Chief Justice Warren (1964)

Congress enacted the language assistance provisions of the VRA to remove obstacles posed by illiteracy and lack of adequate assistance for non-English-speaking Americans. Through the VRA, “Congress intended to remedy racial discrimination in the voting process, education, and other facets of life that result in the disenfranchisement of language minorities”¹⁹

VRA, 12 TEX. J. C.L. & C.R. 163, 167-68 (2007); U.S. CENSUS BUREAU, *Language Use*, *supra* note 2.

18. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

19. Naraski & Ao, *supra* note 15, at 43.

A. Section 203 of the VRA

Section 203 was added to the VRA in 1975. It defines when jurisdictions qualify for bilingual election assistance. A jurisdiction is covered by section 203 of the VRA if it meets two criteria. First, LEP American citizens of voting age in a single language group must: a) number more than 10,000, b) comprise more than 5% of all citizens of voting age, or c) comprise more than 5% of the American Indian or Alaska Native citizens within the Indian reservation that “are members of a single language minority and are limited-English proficient.”²⁰ Additionally, the illiteracy rate of the LEP language minority citizens must be greater than the national illiteracy rate.²¹ The percentages are determined using U.S. census data.²² Currently, thirty-one states fall under the language assistance provisions of section 203, either in part (at least one county) or in whole (the entire state).²³ Section 203 is a temporary provision that will expire when the inequalities these minority populations face cease in the United States; however, in 2006, Congress extended the provision by twenty-five years, acknowledging that racial discrimination still results in the disenfranchisement of language minorities.²⁴

Jurisdictions that meet the criteria of this provision must provide all voting materials in English and in the minority language that triggered section 203.²⁵ Additionally, covered jurisdictions must provide oral language assistance to voters to the extent that such help is needed to allow that group to effectively participate in the election.²⁶ Furthermore, covered jurisdictions must provide “helpers” to language minority voters at polling places on Election Day.²⁷

20. 42 U.S.C. § 1973aa-1a(b)(2)(A). Language minority describes non-English speakers. Members of a single language minority speak the same language. For example, people who speak Japanese are a single language minority of the Asian languages.

21. *See id.* (explaining that a jurisdiction can remove itself from coverage if it can demonstrate that the illiteracy rate is equal to or less than the national illiteracy rate).

22. *See id.*

23. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

24. Narasaki & Ao, *supra* note 15, at 42.

25. *See* 42 U.S.C. § 1973aa-1a(c). Voting materials can include registration materials, voting notices, polling place information, absentee voting, all election forms, publicity, ballots, and other materials or information relating to the electoral process. *See* 28 C.F.R. §§ 55.18-55.19 (2008).

26. *See* 28 C.F.R. § 55.20(a) (2008); *see also* NATIONAL COUNCIL OF LA RAZA, *Language Assistance for Limited English Proficiency Voters*, available at <http://www.nclr.org/content/publications/download/26008>.

27. 28 C.F.R. § 55.20(c) (2008) (stating that the Attorney General must provide bilingual helpers for voters).

B. Section 208 of the VRA

Section 208 of the VRA is another language assistance provision. It states: “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”²⁸ Unlike section 203, section 208 applies nationwide. The United States Code defines “illiteracy” as applying to citizens who have less than a fifth grade education.²⁹ Although this section does not explicitly protect minority language voters, some states have tried to use it for that purpose.³⁰

C. States’ Reactions to the VRA Language Provisions

The current VRA language provisions do not protect the voting rights of smaller contingencies of LEP American citizens. Because section 203 only protects four language groups, whole LEP communities are left unrepresented at the polls if they do not meet certain thresholds.³¹ For instance, following the 2000 Presidential elections, the U.S. Commission on Civil Rights found that Haitian voters in Florida were disproportionately denied the right to vote by untrained poll workers.³² In some instances, bilingual poll workers were directed not to provide language assistance. Even bilingual citizens who offered to help the Haitian-American voters were prohibited from providing language support. Thus, these Haitian-American LEP voters were presented with “ballots that were essentially inaccessible to them.”³³

28. 42 U.S.C. § 1973aa-6 (2006).

29. See 42 U.S.C. § 1973aa-1a(b)(3)(E).

30. See, e.g., Complaint, *United States v. Osceola County, Fla.*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002), available at http://www.usdoj.gov/crt/voting/sec_2/osceola_comp.php (alleging representatives of Osceola County failed to ensure that LEP citizens had an equal opportunity to participate in the political process). The Osceola complaint was resolved by consent decree on July 22, 2002, just four days before the county became covered for Spanish under section 203. The consent decree declared that the county must allow voters to use an assistant of their choice per section 208. See Consent Decree, *Osceola County*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002), available at http://www.usdoj.gov/crt/voting/sec_2/osceola_cd.php.

31. 42 U.S.C. § 1973aa-1a(b). The thresholds require the community of LEPs to be greater than 10,000, comprise more than 5% of all citizens of voting age, or comprise more than 5% of the American Indian or Alaska Native citizens within the Indian reservation that are members of a single language minority and are limited-English proficient, and also have an illiteracy rate greater than the national illiteracy rate. *Id.*

32. U.S. COMM’N ON CIVIL RIGHTS, *Voting Irregularities in Florida During the 2000 Presidential Election*, Ch. 9 (2001), available at <http://www.usccr.gov/pubs/vote2000/report/ch9.htm>.

33. *Id.* When the Department of Justice brought these instances forward, the case was settled by consent order requiring Miami-Dade County to “redress” the harm caused to its sizeable Haitian-American population. See *United States v. Miami-Dade County*, No.

Experience demonstrates that under the current VRA, two voters from the same state can receive disparate treatment: an LEP American citizen may receive bilingual voting materials in one county, while an LEP American citizen whose language or county does not meet the section 203 criteria will not receive bilingual assistance.³⁴ Consequently, unless a state has created its own laws or expanded section 208 so that LEP American citizens are considered disabled or illiterate and therefore allowed to bring an interpreter, LEP American citizens are not able to effectively participate in the electoral process.³⁵

Many states have enacted laws attempting to rectify these inequalities. According to the American Civil Liberties Union, over thirty states have enacted accommodation provisions for LEP American citizens.³⁶ Some current state provisions are similar to the proposed amendment to section 208 and allow LEP American citizens to bring translators into the voting booths.³⁷ For example, the Texas election code provides that a voter can receive assistance in marking the ballot, from a person of his or her choice, if the voter is unable to read the language of the ballot.³⁸

However, despite these provisions, the rights of LEP American citizens continue to be violated, as in *United States v. Berks County*.³⁹ In *Berks County*, a federal district court found that despite Pennsylvania's state provisions to protect LEP voters, there was substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters.⁴⁰ Poll officials turned away voters because they "re-

02-21698 (S.D. Fla. June 17, 2002), available at http://www.usdoj.gov/crt/voting/sec_2/miamidade_ed.htm.

34. See Stephen G. Gey, *The Odd Consequences of Taking Bush v. Gore Seriously*, 29 FLA. ST. U. L. REV. 1005, 1011-12 (2001) (describing the current disparities that exist in many facets of the electoral process to include the methods used by supervisors of elections to conduct the voting process in their jurisdictions).

35. See 42 U.S.C. § 1973aa-6 (2006) (allowing voters who are blind, disabled, or illiterate to bring interpreters of their choice into the voting booth).

36. Jocelyn Friedrichs Benson, *¡Su Voto es su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 303 n.288 (2007). ("The following states have all enacted some sort of law aimed at providing accommodations for LEP voters: Alabama, Alaska, Arizona, Colorado, Connecticut, California, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming.").

37. *Id.* at 303.

38. TEX. ELEC. CODE ANN. §§ 64.031-.034 (Vernon 2003).

39. 277 F. Supp. 2d 570, 573 (E.D. Pa. 2003).

40. *Id.*; 25 PA. CONS. STAT. § 1327(a)(6) (2002) ("In jurisdictions where a single language minority exceeds 5% of the population, the secretary shall: (i) print a bilingual application; and (ii) conduct a public educational program among that language group alerting both organizations and individuals of that group of the availability of the bilingual application and encouraging individuals to register.").

fused to ‘deal’ with Hispanic surnames,” or to give ballots to “Spanish-speaking people.”⁴¹ Thus, although states sometimes try to protect LEP American citizens by enacting provisions for assistance at the polls, the laws are not always effective. Such unequal treatment could be overcome if LEP American citizens were permitted to take control of their voting rights by bringing their own translators. Amending the federal statute to allow LEP American citizens to bring their own translators would eliminate some of the injustices done by poll workers.

In 2006, James Thomas Tucker and Rodolfo Espino, professors at Arizona State University, conducted a study concerning the behaviors of election officials and jurisdictions towards LEP voters. It is one of the most comprehensive studies of its kind.⁴² The study surveyed all jurisdictions that have a large LEP population as identified by the Census Bureau. The surveyed subjects included jurisdictions where demographics required compliance with either section 4(f)(4) or section 203; all counties in the five LEP covered states; all cities in LEP covered jurisdictions that the 2000 Census reported as having 50,000 or more people; some jurisdictions that are no longer covered as a result of the 2002 Census determinations; and the chief elections officer in each of the surveyed states.⁴³

1. *Election Officials Fail to Meet VRA Standards*

Although election officials are responsible for allowing all eligible citizens to vote, the Tucker and Espino survey found that most jurisdictions covered by section 203 have failed to meet the standards required to assist LEP American citizens with voting.⁴⁴ During the 2008 federal elections, officials in Greeley, Colorado did not provide Election Day instructions or ballots in Spanish, although census figures show the area was 27% Latino, making it subject to section 203.⁴⁵ These failures occur because of election officials’ lack of effort

41. *Berks County*, 277 F. Supp. 2d at 575.

42. The survey guaranteed jurisdictions anonymity to increase the likelihood of the survey’s completion. Over half of all surveyed jurisdictions responded. Complete responses were received from 361 jurisdictions in thirty-one states. The actual number of responses varied because some questions did not apply to all respondents and some respondents chose not to answer certain questions. Of the thirty-three states receiving the survey, 93.9% responded. See Tucker & Espino, *supra* note 17, at 175-76; see also James Thomas Tucker & Rodolfo Espino, *Minority Language Assistance Practices in Public Elections: Executive Summary*, Ariz. State Univ. (Mar. 7, 2006), available at <http://www.votingrights.org/news/downloads/Executive%20Summary.pdf> [hereinafter *Tucker Espino Study*].

43. Tucker & Espino, *supra* note 17, at 175-76 (indicating a total of 810 jurisdictions in thirty-three states were surveyed).

44. *Id.* at 186.

45. Chris Casey, *Group Protests Lack of Spanish Ballots, Access for Latinos*, FORT COLLINS NOW, Nov. 4, 2008, <http://www.fortcollinsnow.com/article/20081104/NEWS/>

and knowledge regarding what is required of them. For instance, surveyed election officials underestimated the number of voters in their jurisdictions who needed language assistance in public elections by half.⁴⁶ Furthermore, some elected officials could not define who qualified as an LEP voter and thought voters who spoke some English were not entitled to any language assistance.⁴⁷ Nearly two-thirds of covered jurisdictions reported that they did not consult with community organizations or individuals in the covered language groups to determine the best method of assistance as section 203 requires.⁴⁸

The failure of election officials to follow the existing VRA language provisions demonstrates one inadequacy of section 203: forcing LEP American citizens to rely on election officials leaves these citizens without an avenue to vote. One-third of all election officials reported either providing no language assistance or providing only written language materials despite the need for language assistance in their jurisdictions.⁴⁹ One election official reported that although his jurisdiction fell under the language assistance provisions of section 203, he had never provided oral or written ballot assistance in any of the jurisdiction's polling locations.⁵⁰ "[T]welve jurisdictions expressly advocated English-only elections," and for ideological reasons, some elections officials refused to follow the section 203 requirements for their jurisdictions.⁵¹ LEP American citizens must be permitted to take control of their voting rights through the section 208 amendment and remove themselves from the disparate treatment of unconcerned or hostile election officials.

Even when language assistance is available, it rarely meets the standards required by section 203 that apply to "assistance in all stages of the electoral process, from voter registration through activities related to conducting elections."⁵² Only 32.9% of the surveyed jurisdictions provided oral assistance for more than half of the election activities that took place.⁵³ Additionally, the majority of jurisdictions did not inform voters about the availability of language assistance prior to Election Day.⁵⁴ Nearly all covered jurisdictions acknowledged

811049973/1062&ParentProfile=1054&title=Group%20protests%20lack%20of%20Spanish%20ballots,%20access%20for%20Latinos.

46. Tucker & Espino, *supra* note 17, at 186 (explaining that election officials estimated an average of 5.5% of their voters required assistance, half the actual number, 10.9%).

47. *Id.* at 187.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 187-88.

52. 28 C.F.R. § 55.15 (2008).

53. Tucker & Espino, *supra* note 17, at 193.

54. *Id.* at 213.

failing to provide assistance at all stages of the process.⁵⁵ This inaction is magnified because the early stages of the electoral process, such as voter registration, receive the least assistance, despite having the greatest impact on first time voters.⁵⁶

Even if jurisdictions provided the required language assistance through written voting materials, written bilingual materials are still not enough to solve the problem. On average, non-English speakers have high illiteracy rates, making it impossible for many LEP American citizens to use bilingual election materials.⁵⁷ Requiring LEP American citizens to read ballots despite the high probability that they are illiterate could be considered a “test or device” that would violate the VRA⁵⁸ as affirmed by the Supreme Court in *Katzenbach v. Morgan*.⁵⁹ The Court also held that imposing a literacy requirement, regardless of whether the intent was to create an incentive to learn English, violated the VRA.⁶⁰ Therefore, given the high number of illiterate LEP American citizens, oral assistance is necessary to ensure these voters a voice. Because local officials have failed to obtain an adequate number of non-English-speaking poll workers, bringing one’s own assistant is the best solution for compliance with the VRA.

Finally, although section 203 requires covered jurisdictions to provide bilingual election workers for assistance, most jurisdictions fail to adequately do so. Of the surveyed jurisdictions, more than 57% reported having no full time employees fluent in a language other than English. Less than 42% of jurisdictions had a full time worker who spoke the required language under section 203. Regardless of which of the four language groups was required, the number of bilingual workers remained below what was necessary. Approximately 56% did not employ a Spanish-speaking worker, 81% did not employ a worker fluent in an Alaska Native or American Indian language, and more than 66% did not employ a full time employee fluent in an Asian language.⁶¹ While the numbers increase slightly with part time bilingual

55. *Id.* at 193, 196.

56. *Id.* at 194-95.

57. *Id.* at 195.

58. 42 U.S.C. § 1973aa(b) (2006) (“[T]he term ‘test or device’ means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.”).

59. 384 U.S. 641, 654-56 (1966) (affirming the notion that states cannot use literacy tests to determine one’s voting eligibility).

60. *Id.* at 648-58. The court opined that Congress may have “questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English.” *Id.* at 654.

61. Tucker & Espino, *supra* note 17, at 198-99.

employees, they still fall far short of section 203's requirements.⁶² Although the established language provisions cover just four of the hundreds of language groups spoken in the United States, the failure of election poll officials to adhere to the VRA provisions remains prevalent, leaving LEP voters without translators or the bilingual materials required by the VRA.⁶³

2. *Relying on Poll Workers Does Not Meet VRA Standards*

Similarly, election poll workers, the only people with whom voters interact, are generally unprepared for their positions due to lack of training or ability. Nearly two-thirds of the jurisdictions that used bilingual employees did not require any confirmation of the worker's language abilities. Thus, workers could inaccurately report their oral or written language skills, rendering language assistance unavailable at those polls where it has been advertised.⁶⁴ Even some jurisdictions that claim to confirm a worker's language ability merely ask the worker to report language ability, without requiring a test or other verification in the language.⁶⁵

In two-thirds of the responding jurisdictions, training of poll workers did not include information on the languages requiring assistance under section 203. This training is often mandated by the state, yet it does not include information on the languages federally required to be spoken in particular jurisdictions.⁶⁶ Additionally, most jurisdictions did not train their workers through role-playing activities dealing with potential problems or the voting process.⁶⁷

In many jurisdictions, Election Day training focused on state laws, which may conflict with federal laws. For example, about one-half of the respondents did not permit a voter to receive assistance in the voting booth from a translator because state law had certain requirements of the translator.⁶⁸ Workers were also unaware of section 208's protections, as 98.1% of jurisdictions incorrectly stated who, if

62. *Id.* at 200 (indicating the percentage of part time election workers who were fluent in a language besides English: 12.2% fluent in Spanish, 0.6% fluent in an Alaska Native or American Indian language, and .1% fluent in an Asian Language).

63. *See generally* 28 C.F.R. § 55.17 (2008) ("[A] targeting system will normally fulfill the Act's minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them."). The statistics above demonstrate that those LEP citizens are not receiving the "language materials and assistance" necessary. Therefore, the current "targeting" system cannot work.

64. Tucker & Espino, *supra* note 17, at 206.

65. *Id.* at 207.

66. *Id.* at 208.

67. *Id.*

68. *Id.* at 209 (explaining that some jurisdictions complied with more restrictive state laws, such as not allowing voters' own children into the booth, in contradiction to the federal law that minors can provide effective assistance to their parents).

anyone, was allowed in the voting booth.⁶⁹ Consequently, poll workers in the past have likely denied qualified voters the right to allow a translator or assistant to enter the booth with them.⁷⁰

The proposed amendment to section 208 to include LEP American citizens would allow nearly 10% of the U.S. population to bring their own translators into the booth.⁷¹ This large percentage, in addition to those who were previously covered by the original section—the disabled, blind, or illiterate—will greatly increase awareness of the provision. With a significant portion of the population being permitted to bring translators, poll workers will have increased awareness of the VRA provision, resulting in greater adherence to section 208. Furthermore, there will be less need to enforce the language provisions because section 208 allows voters to self-enforce by bringing the translators with them. Thus, everyone wins as the use of translators allows poll workers and election officials to perform their jobs more effectively while also allowing more Americans to become involved in the political process.

III. GOING BEYOND THE EXISTING VRA—AMENDING SECTION 208

According to the U.S. Supreme Court, an equally effective voice is vital in achieving full and effective participation from all voters.⁷² The jurisdiction surveys, coupled with low participation rates, demonstrate that current American election laws fail to protect the rights of LEP American citizens by preventing millions of them from effectively participating in the electoral process.⁷³ The proposed amendment to section 208 to include LEP voters as citizens who are permitted to bring an assistant of their choice into the voting booth is the most viable solution for restoring the right to vote to LEP voters. According to the 2000 census, millions of voting age American citizens speak a language other than one covered by the current minority language provisions.⁷⁴ Because the VRA currently only refers to four language minority groups, it leaves many current citizens without the opportunity to vote.⁷⁵ Thus, the provisions must be expanded to give every American an equal voice.

69. *Id.*

70. See 42 U.S.C. § 1973aa-6 (2006); Tucker & Espino, *supra* note 17, at 206.

71. See U.S. CENSUS BUREAU, *Percent of People Who Speak English Less than "Very Well,"* *supra* note 7.

72. See *Reynolds v. Sims*, 377 U.S. 533, 565 (1963).

73. U.S. CENSUS BUREAU, *Language Spoken at Home for the Citizen Population 18 Years and Over Who Speak English Less than "Very Well,"* *supra* note 8.

74. See Hyon B. Shin & Roaslind Bruno, *Language Use and English Speaking Ability: 2000*, U.S. CENSUS BUREAU, at 2-3 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

75. See 42 U.S.C. § 1973aa-1a(e) (2006).

A. Changing Demographics Require Cost-Efficient Action

Existing LEP provisions have increased voter participation, but more must be done. Following the passage of section 203, Latino voters increased from 2.4% to 3.6% of the national electorate.⁷⁶ Native American participation also increased; in one Arizona county, registration grew 165% from 1972-1990.⁷⁷ Studies show that when translated ballots and election materials are unavailable to voters, participation decreases while voter error increases.⁷⁸

LEP American citizens claim they would vote regularly if they were allowed bilingual assistance, because they feel “more comfortable” speaking and voting in their own, non-English language.⁷⁹ Currently, the LEP voter participation rate is lower than the rate of voting for average citizens.⁸⁰ In 1975, the House and Senate Judiciary Committees reported that only 44.4% of Latino citizens were registered voters in comparison to 73.4% of non-LEP citizens.⁸¹ In the 1974 national election, only 22.9% of eligible Latino citizens voted. These rates are less than half the non-LEP voter participation rate.⁸² Similarly, tribal leaders list language issues as a significant barrier between Native Americans and the vote. Native American voter registration rates are less than half those of the general population.⁸³ Furthermore, low LEP voting rates extend beyond those language minorities covered under section 203; for instance, Arab-American voting patterns also reflect the trend of lower registration and participation.⁸⁴ The current disparities between the voting rates of non-LEP and LEP American citizens demonstrate the need to make LEP voters feel more comfortable with the voting process. Through the proposed amendment to section 208, LEP voter participation rates would increase because the use of an assistant who speaks the same language as the LEP voter would make the voter more comfortable.

As the LEP population of the United States continues to grow in diversity, U.S. laws must also grow to preserve the rights of these citizens. Instead, the electoral process barriers to voting for the non-

76. Benson, *supra* note 36, at 270-71.

77. H.R. REP. NO. 102-655, at 6-7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 770-71.

78. Benson, *supra* note 36, at 272.

79. *Id.*

80. *Id.* at 267-68.

81. *Id.* at 267.

82. *Id.*

83. *Id.* at 268.

84. *Id.* at 268-69 (noting that the average turnout of the precinct with the highest concentration of Arab American voting citizens was 10% lower than the average precinct in the 2004 primary election).

English-speaking population continue to grow.⁸⁵ The number of households in which no member fourteen or older speaks English “very well” has also continued to increase.⁸⁶ This is particularly true among immigrants from nondemocratic societies. Census figures indicate that the Arab population increased 41% in the 1980s and 38% in the 1990s.⁸⁷ Currently, 35% of Arabic-speaking American citizens qualify as LEP voters.⁸⁸ Similarly, the number of Russian-speaking individuals in the United States tripled between 1990 and 2000.⁸⁹ Voters from nondemocratic societies value the right to vote, but they may be unfamiliar with the process. These voters may have a harder time understanding instructions and ballots because it may be their first exposure to these methods. Because Arabic, Russian, and hundreds of other languages are not included in section 203’s provisions, these non-English-speaking American citizens are left without a voice.⁹⁰

Given the nearly four hundred different languages spoken across the United States, it would be impractical and costly to require jurisdictions to provide assistance for every language.⁹¹ Under the current VRA, the cost for providing written language materials in only four language groups composes 8.1% of all election expenses.⁹² To impose these costs on all 380 different languages spoken in the United States would be an unnecessary waste of resources when it can be done in a more cost effective manner. The proposed section 208 amendment would provide the necessary avenue for LEP American citizens to receive voting assistance from translators without generating expenses to local governments for costly ballots in hundreds of languages.⁹³ Furthermore, empowering LEP citizens to take ownership of their voting rights by bringing their own assistants minimizes the enforcement costs of the provision.⁹⁴ It would no longer be the responsibility of the election officer to verify that a voter received help. Ra-

85. See S. REP. NO. 102-315, at 10 (1992) (“[S]ection 203 has had no impact on Hispanics, Asian Americans, or Native Americans in the 90 percent of U.S. counties where it has never applied.”).

86. Benson, *supra* note 36, at 262-63.

87. de la Cruz & Brittingham, *supra* note 11, at 2. A person is included in the Arab category if he or she has ancestries originating from Arabic-speaking countries (e.g. Iraq, Palestine, Lebanon). *Id.*

88. Benson, *supra* note 36, at 263.

89. *Id.* at 262.

90. See 42 U.S.C. § 1973aa-1a(e) (2006).

91. See generally Shin & Bruno, *supra* note 74 (listing 380 different language categories recognized in the United States census).

92. Tucker & Espino, *supra* note 17, at 218.

93. See *id.* at 217 (explaining that having an assistant to help in another language costs no more than if that assistant were there to help English voters).

94. See *id.* at 217.

ther, if a voter requires help, he or she will bring an assistant or request assistance.⁹⁵

The section 208 amendment is particularly relevant as the United States receives a new wave of immigrants from historically nondemocratic areas such as the Middle East and Russia.⁹⁶ These non-English-speaking citizens recognize the significance of voting, but they must be shown how to effectively use their voice in the electoral process. In allowing these LEP American citizens to take their own trusted translators into the voting booth, America will gain more informed and effective voters, while becoming more cost-efficient in the use of its resources.

B. Wording of Section 208 Amendment

Given the poor treatment of LEP American citizens throughout the electoral process, as discussed above, LEP American citizens should be empowered to take matters into their own hands. Suggestions for reform have included increasing funding to improve the quality and quantity of bilingual election materials or incorporating new technologies that simplify translations to help include LEP American citizens in the electoral process.⁹⁷ These methods will not work.⁹⁸ Bilingual materials only help the voters who understand that second language. Because bilingual materials do not cover all languages, they do not help all LEP voters. Additionally, because election officials and poll workers violate the current VRA provisions by refusing to assist LEP voters despite penalties of fines or imprisonment, it is unlikely these same workers will use any new methods made available to their jurisdictions to assist LEP voters.⁹⁹

Therefore, the proposed amendment explicitly tries to minimize the negative effects others can have on an LEP American citizen's vote. The wording chosen for the amendment is definite. Although several states have enacted statutes to incorporate LEP American citizens into their state version of section 208, the language of most of these statutes has allowed for loop-holes in the law that keep LEP American citizens from effectively participating in the electoral process.¹⁰⁰ For example, Georgia's statute reads as follows:

95. Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, SANTA CLARA UNIVERSITY SCHOOL OF LAW 293, 305 available at <http://www.law.berkeley.edu/centers/ewi-old/research/votingrights/vra/ch%2011%20ancheta%203-9-07.pdf> (describing the minimal government role in section 208).

96. Benson, *supra* note 36, at 263.

97. See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1748 (2005) (noting that technology may play some role in language accessibility for LEP voters in the future).

98. See *id.* at 1748-49.

99. See 42 U.S.C. § 1973aa-3 (2006).

100. See Benson, *supra* note 36, at 303 n.288.

No elector shall receive any assistance in voting at any primary or election unless he or she is *unable to read the English language* or he or she has a disability which renders him or her unable to see or mark the ballot or operate the voting equipment or to enter the voting compartment or booth without assistance. A person assisting an elector shall identify himself or herself to a poll worker who shall record such information on the disabled elector's voter certificate showing that such person provided assistance in voting to such elector.¹⁰¹

By expressly including citizens who are unable to read English, the Georgia statute includes both English-speaking and non-English-speaking illiterate voters; however, this statute fails to address those voters with some level of functional literacy. Although one may be able to read basic English, he or she may have a higher level of competency or confidence in another language.¹⁰²

Some electoral officials make this assumption because they are aware of the English citizenship test that naturalized immigrants must pass. Therefore, they assume that if citizens are capable of passing the test, they are also capable of voting in English.¹⁰³ However, these assumptions fail to consider several points. First, some immigrants, such as older immigrants who have resided in the United States for several years, become naturalized without demonstrating English proficiency.¹⁰⁴ Similarly, if an immigrant has a disability that prohibits him or her from learning English, he or she can also be exempt from taking the English citizenship test.¹⁰⁵ Further, understanding complex ballot questions and Constitutional amendments requires more than basic English proficiency.¹⁰⁶ For example, in the 2008 election, analysts found that average English-speaking citizens had difficulty understanding the complexities of the proposed Florida constitutional amendments. Amendment 1, which was rarely understood, read as follows:¹⁰⁷

Proposing an amendment to the State Constitution to delete provisions authorizing the Legislature to regulate or prohibit the own-

101. GA. CODE ANN. § 21-2-409(a) (2008) (emphasis added); *see also* *Morris v. Fortson*, 261 F. Supp. 538, 540 (N.D. Ga. 1966) (demonstrating that "unable to read" refers to an illiterate voter).

102. *See Morris*, 261 F.Supp at 540.

103. *See* H.R. REP. NO. 102-655, at 21 (1992) (suggesting that because prospective citizens must demonstrate English competency to be naturalized, it is appropriate to require English competency to cast a ballot).

104. 8 U.S.C. §1423(b)(2) (2006). This was what occurred with Franz, refer to Section I, *supra*, at pg. 1.

105. *See id.* §1423(b)(1).

106. Newman, *supra* note 14, at 338.

107. Josh Hafenbrack, *State Issues Mystify Voters—Many Have No Idea How to Vote on Six Amendments*, SUN SENTINEL, Nov. 1, 2008, at 1B.

ership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship.¹⁰⁸

In layman's terms, passing this amendment would eliminate a provision that allows the Legislature to ban immigrants from owning land, serving to strike racism from the state constitution.¹⁰⁹ As demonstrated, it is easy for native English speakers to lose an amendment's meaning amidst legal and governmental jargon. Thus, it is irrational to expect a person with limited English proficiency to come to that interpretation.¹¹⁰ Therefore, the voting assistance statute of Georgia and other states continues to exclude minority language voters who may be able to read the English language but may be unfamiliar with legal terms sometimes found in amendments or are, as a whole, more effective in their comprehension of another language.

Additionally, although many states, including Georgia, incorporate provisions requiring an elector's translator or assistant to identify and record his or her information on the elector's voting certificate, those provisions are purposefully absent from the proposed section 208 amendment.¹¹¹ As noted in cases such as *Berks County* and in the Tucker and Espino study, LEP American citizens are less likely to vote when they feel singled out.¹¹² This is usually the result of embarrassment, or feeling as though they are being looked down upon by others.¹¹³ The forms required by many states, such as Georgia, call for assistants to provide their names and other identifying features such as their counties of residence and other demographic information. The forms may also require assistants to describe or list whom they are assisting and why that voter needs assistance.¹¹⁴ Such forms single out LEP American citizens and can cause embarrassment that may keep them from voting in the future. To have the highest possible voter participation, the voting process must protect the voter's privacy and feelings of security.¹¹⁵ If, as proposed in the amendment

108. Vote Smart Florida, http://www.votesmartflorida.org/mx/hm.asp?id=Nov08_Amendment1 (last visited Oct. 27, 2009).

109. Hafenbrack, *supra* note 107, at 1B. This provision failed by only receiving 52.1% of the vote; Florida requires 60% of the vote. See Fla. Dep't of State—Election Results, <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2008> (last visited Oct. 27, 2009).

110. See, e.g., Casey, *supra* note 45 (describing Latino voters on Election Day, November 4, 2008, who “‘don't know how they voted because (the ballot) [was] in English’”).

111. See GA. CODE ANN., § 21-2-409(a) (2008); Benson, *supra* note 36, at 303 n.290.

112. See *United States v. Berks County*, 250 F. Supp. 2d 525, 529 (E.D. Pa. 2003); *Tucker Espino Study*, *supra* note 42.

113. See Thomas H. Earle & Kristi M. Bushner, *Effective Participation or Exclusion: The Voting Rights of People with Disabilities*, 11 TEMP. POL. & CIV. RTS. L. REV. 327, 330 (2002).

114. See, e.g., 5 Brown Ga. Pleading, Prac. & Legal Forms Ann. § 21-2-384 Form 2 (3d ed.), Oath of Person Assisting Absentee Elector (Statutory Form).

115. See Earle & Bushner, *supra* note 113, at 327-30.

to section 208, all voting assistants were simply required to sign a declaration that they are not the voter's employer, an agent of the voter's employer, or an officer or agent of the voter's union, we could continue to protect voters from intimidation, while also protecting their anonymity to the greatest extent possible.¹¹⁶

The current electoral system allows for non-precinct voting through early voting methods such as "no excuse" ballots, absentee ballots, and vote by mail (VBM).¹¹⁷ A voter who participates in an election through one of these methods can seek assistance in completing his or her ballot. Supporters note that non-precinct voting methods allow voters to study the ballot and issues more closely and to make more informed choices.¹¹⁸ Neither these voters nor anyone who assists them is required to sign a sworn affidavit, give personal information, or inform the government in any way that he or she received or provided assistance.¹¹⁹ Despite debates since the 1860s over ensuring a vote's protection when ballots are cast outside the polling place, voting by absentee ballot is universally accepted.¹²⁰ Absentee ballots have been used for over a century and are available to voters from all fifty states.¹²¹ Additionally, there has been a large movement towards "no excuse" voting, which expands early voting by not requiring a reason for voting prior to Election Day.¹²²

Proponents of non-precinct voting hold that these methods increase voter turnout and expand political participation in previously under-represented demographic groups.¹²³ In the 2006 elections, 25% of voters (more than twenty-five million Americans) voted through early voting methods.¹²⁴ Furthermore, in the 2008 election, approximately thirty million Americans used early voting.¹²⁵ Thus, if nearly

116. See proposed language *supra* p. 4-5.

117. Paul Gronke & Eva Galanes-Rosenbaum, *The Growth of Early and Precinct Place Balloting: When, Why, and Prospects for the Future*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* 261, 262-63 (Benjamin E. Griffith ed., Am. Bar Ass'n 2008). Early voting typically means any mode of balloting by which voters can cast a ballot before Election Day either at an election center or in their homes. It is virtually impossible to determine what method of early voting each voter used when states make their election reports. *Id.* at 262.

118. See *id.* at 262-65.

119. See *id.* at 265.

120. *Id.* at 262-63.

121. *Id.* at 263-64. Traditional absentee ballot laws required a demonstrable reason or proof of status for early voting, such as being a college student who must receive a ballot by mail in order to vote outside his or her precinct. *Id.* at 265.

122. *Id.* at 262.

123. PROJECT VOTE, YOUR BALLOT'S IN THE MAIL: VOTE BY MAIL AND ABSENTEE VOTING (2007), available at http://projectvote.org/images/publications/Policy%20Briefs/PB13-Vote_by_Mail.pdf.

124. Gronke & Galanes-Rosenbaum, *supra* note 117, at 268.

125. Paulo Prada, Evan Perez, Corey Dade & Douglas A. Blackmon, *Election '08: For a Historic Election, an Enormous Turnout*, WALL ST. J., Nov. 5, 2008, at A7; see also United States Elections Projections, 2008 General Election Turnout Rates, available at

one-third of American votes are cast without the declaration of whether the citizen was assisted, there is no reason to burden LEP American citizens or those who assist them with additional requirements just because they choose to vote at polling places on Election Day.

C. Long-Term Positive Effects

The increased support LEP American citizens receive through language provisions, such as the proposed section 208 amendment, creates long-term positive effects in representation and voter turnout. First, increased numbers of LEP voters would heighten voter turnout, particularly among peripheral voters.¹²⁶ Therefore, election results would be a more accurate portrayal of American sentiments. Secondly, the proposed amendment would help to expand the growth of minority citizens, who remain grossly underrepresented in the political process. The number of elected officials in these groups has increased with the increased LEP voter participation.¹²⁷ The two groups most actively targeted by current minority language provisions are Latinos and Asian Americans.¹²⁸ Between 1973 and 1991, the number of elected Latino officials roughly tripled from 1280 to 3677 in Arizona, California, Florida, New Mexico, New York, and Texas.¹²⁹ Additionally, the number of Asian Americans holding elected or federally appointed positions dramatically increased from a few hundred in 1978 to over 2000 in 2009.¹³⁰ Accordingly, language accommodations that increase the number of LEP voters can be directly linked to the increased numbers of elected officials from these minority groups.¹³¹

Increased representation among minority groups serves the LEP population by giving it a voice and increasing the responsiveness of

http://elections.gmu.edu/Turnout_2008G.html; see also Frank Newport, *Early Read on Early Voting, Could Reach 30%*, GALLUP, Oct. 24, 2008, <http://www.gallup.com/poll/111430/Early-Voting-Now-11-Could-Reach-30.aspx>.

126. See Thomas G. Hansford & Brad T. Gomez, *Reassessing the Effect of Variation in Voter Turnout on Electoral Outcomes 24* (unpublished manuscript, on file with the Florida State University Political Science Department), available at http://myweb.fsu.edu/bgomez/HansfordGomez_APSR09.pdf (last visited Oct. 27, 2009).

127. See *id.*

128. See Benson, *supra* note 36, at 273-74 (noting that because Hispanic and Asian languages are the second and third most spoken languages in the United States, they have received the most benefits from the provisions of section 203).

129. Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1495 (1993); see also Benson, *supra* note 36, at 272-73.

130. Benson, *supra* note 36, at 273; see also Juliana Barbassa, *Asian-American Political Profile Rising in U.S.*, SAN FRANCISCO GATE, Jan. 18, 2009, <http://www.capacommunity.org/news/20090118sfgate.pdf> (describing current information on Asian American representation).

131. Benson, *supra* note 36, at 273.

all elected officials toward LEP communities.¹³² In a survey of Latinos, the majority of those who reported some interaction with their elected representatives found that both Latino and non-Latino public officials treated them fairly.¹³³ Similarly, respondents believe that the last public official with whom they interacted treated them fairly. This has resulted in an overall perception of government fairness among the Spanish-speaking population.¹³⁴ By amending section 208, the number of languages protected will increase, resulting in an increase in both minority representation and the perception of government fairness, as demonstrated in Hispanic and Asian communities.

Another positive effect of amending section 208 would be an increase in goodwill among and towards LEP American citizens.¹³⁵ It is important to rectify the wrongful exclusion of LEP American citizens in the past. The presence of bilingual voting materials and translators assisting bilingual voters serves to remind American voters that non-English speakers are citizens too.¹³⁶ The amended provision would expand the goodwill already generated among the language groups section 203 protects. Its enactment and use at the polls would serve as a reminder to all voters that LEP American citizens were consciously excluded from participation in the electoral process for nearly 100 years.¹³⁷ By expanding section 208 to encompass all LEP American citizens, existing examples of language accommodations suggest that LEP voters would feel empowered and included, thereby increasing their engagement and integration with other Americans.¹³⁸ Moreover, the proposed amendment would help assimilate LEP American citizens into the American population by allowing them to participate in a valued American tradition—voting.¹³⁹

D. Potential Criticisms of the Amendment

Although expanding section 208 to allow LEP voters to bring assistants with them has not yet been proposed, several arguments

132. de la Garza & DeSipio, *supra* note 129, at 1505.

133. *Id.*

134. *Id.*

135. *See id.* at 1518.

136. *See id.* (stating that the current minority provisions “serve as a signal that Latinos are welcome in the American political system”); *see also* Allison M. Dussias, *Waging War with Words: Native Americans’ Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 940 (1999) (noting that the enactment of the Native American Language Act indicated government appreciation for the native American population).

137. *See, e.g.*, Dussias, *supra* note 136, at 939 (noting that for over one hundred years government policies aimed at suppressing and ultimately eradicating the traditional languages of the indigenous peoples of the United States and replacing them with English).

138. *See* de la Garza & DeSipio, *supra* note 129, at 1518.

139. *See* Dussias, *supra* note 136, at 914 (referring to how participation in American processes can be used as an assimilation tool).

have been made against allowing other people into the voting booth.¹⁴⁰ Some may argue that amending section 208 is futile because the greatest problem with the existing provision is that it is frequently misapplied, ignored, or blatantly violated by local election officials.¹⁴¹ However, misapplication can be remedied through proper training, such as distributing informational videos that would ensure local election officials are aware of the protections under section 208.¹⁴² Furthermore, since elected and paid officials continue to deny minority voters the right to language assistance, allowing translators into the booths while removing hostile workers who refuse to help is the best way to increase LEP American citizens' comfort with the voting process.¹⁴³

1. *English Language Supporters*

Some Americans support an English-only movement for elections.¹⁴⁴ They claim it is the voter's responsibility to learn English and that U.S. citizens should be required to read and write English.¹⁴⁵ Additionally, some claim that providing ballots in multiple languages acts as a barrier to assimilation for minority language speakers into the American culture.¹⁴⁶ The proposed amendment of section 208 places the "burden" of voting on LEP American citizens by requiring them to bring their own assistants or translators; therefore, the amendment pacifies those who favor and those who oppose an English-only movement. The amendment helps eliminate the need for non-English election materials while also calming LEP voters' fears of being provided a hostile translator who disfavors language assistance.¹⁴⁷ Thus, LEP American citizens become more assimilated into the electoral process. In addition, LEP American citizens utilizing the language assistance provided from the section 208 amendment may speak English but are more confident voting in another

140. See INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE (IDEA), *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* 72 (2002), available at <http://www.idea.int/publications/ies/upload/12.%20Balloting.pdf> (describing the importance of casting one's ballot in secret and not allowing others to see a person's vote).

141. *Tucker Espino Study*, *supra* note 42, at 23 (noting that 90% of jurisdictions reported do not comply with section 208).

142. See *Tucker & Espino*, *supra* note 17, at 208, 221-22.

143. See *id.* at 191.

144. See, e.g., *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 944-45 (9th Cir. 1995).

145. *Tucker & Espino*, *supra* note 17, at 225.

146. Press Release, U.S. Congress, King Applauds Decision to Give Americans Another Chance to End Bilingual Voting (June 21, 2006) http://www.house.gov/list/press/ia05_king/PRBilingualBallots062106.html.

147. See, e.g., *id.* (describing Congressman Steve King's support of eliminating bilingual ballots in order to "unify" the country under the English language).

language.¹⁴⁸ Consequently, these voters would be taking the responsibility of voting seriously by ensuring that they understand, to the best of their abilities, the proposals on the ballot. It is always better to have informed voters.

Additionally, an English-only movement contradicts the government's established pattern of facilitating LEP American citizens' full participation in other arenas, such as education, health care, and the legal system.¹⁴⁹ For example, in *Lau v. Nichols* the Supreme Court held that LEP students in secondary schools have the right to study in their native languages; this led to the Equal Education Opportunities Act, which codified the decision.¹⁵⁰ The Equal Education Opportunities Act instituted bilingual education programs in public schools across the country.¹⁵¹ Likewise, the guidelines of the U.S. Department of Health and Human Services require that LEP patients have meaningful access to health care.¹⁵² Those guidelines require federally funded medical providers, such as Medicare and Medicaid, to provide translators for LEP patients so they can understand the services and benefits available to them.¹⁵³ Additionally, courts across the country have held companies liable for failing to provide product or manufacturing warnings on potentially hazardous products in languages other than English if it was foreseeable that non-English-speaking populations would use those products.¹⁵⁴ Thus, the govern-

148. Under the current statute, voters who have below a 5th grade reading level constitute illiterate voters, even though they may speak fluent English. See 42 U.S.C. § 1973aa-6 (2006).

149. See, e.g., *Yniguez*, 69 F.3d at 944-47 (rejecting the argument that English-only laws promote significant state interests in protecting democracy by encouraging unity and political stability, encouraging a common language, and protecting public confidence); *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that a California school district's failure to accommodate LEP students and provide programs designed to assist them in overcoming their language barriers was discrimination and violated the Civil Rights Act of 1964).

150. *Lau*, 414 U.S. at 566-67 (holding that the school system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied them meaningful opportunities to participate in public educational program, and finding that equality is not provided by providing the same facilities, textbooks, teachers, and curriculum).

151. Memorandum from J. Stanley Pottinger, Dir., Office for Civil Rights, Dep't of Health, Educ., and Welfare to School Districts with More than Five Percent National Origin-Minority Group Children (May 25, 1970), available at <http://www.ed.gov/about/offices/list/ocr/docs/lau1970.html>.

152. Policy Guidance on the Prohibition Against National Origin Discrimination As It Affects Persons With Limited English Proficiency, 65 Fed. Reg. 52762-01, 52765 (Aug. 30, 2000).

153. Benson, *supra* note 36, at 277.

154. See, e.g., *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (holding that a company that did not provide Spanish warnings did not meet its duty to warn when it was foreseeable that the product would be used by farm laborers who were unable to speak English); *Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570, 1576 (S.D. Fla. 1992) (finding that when a product manufacturer reaches out to non-English-speaking consumers through non-English media, product warnings in English only are insufficient); *Campos v. Firestone Tire & Rubber Co.*, 485 A.2d 305, 310 (N.J. 1984) (finding that a tire

ment and courts are united in their support of facilitating LEP American citizens with meaningful access to government information and processes in their native languages. As such, facilitating voting for LEP American citizens through the proposed amendment to section 208 expands LEP accommodations from health care and public schools into the electoral process.

2. *Possible Burdens on LEP American Citizens*

Section 208 imposes a burden on the voter to locate and access an available family member or friend to assist in the electoral process. Some may argue against the section 208 amendment on the basis that requiring voters to obtain their own assistants could have a chilling effect on the voting process; however, that argument fails to recognize that many LEP voters would be chilled from voting if they did not personally know their assistants.¹⁵⁵ Not knowing one's voting assistant could result in a lack of trust or confidence that the ballot was interpreted and cast correctly.¹⁵⁶ Additionally, using a jurisdiction's bilingual poll worker creates situations in which the LEP American citizen must disclose his or her inabilities, causing embarrassment. Feeling uncomfortable at the polls because of distrust or embarrassment leads to lower voter participation.¹⁵⁷

Conversely, an assistant of the LEP voter's choice requires less detailed disclosure and is unlikely to cause embarrassment. This provides voters with a higher level of privacy and anonymity.¹⁵⁸ If an LEP voter cannot obtain an assistant, he or she still has other options such as using a bilingual poll worker, if available, or voting from home at a more convenient time to obtain assistance.¹⁵⁹ Therefore, despite the LEP voter's responsibility to obtain an assistant under the amended section 208, LEP voters are less likely to be chilled from the voting process if they can utilize their own assistants.

3. *Potential Voter Fraud*

The international standards of democratic elections require that votes be cast by secret ballot or an equivalent voting procedure.¹⁶⁰ Thus, some Americans may argue that allowing an assistant into the voting booth is an abuse of the system because it can cause voter

company had a duty to provide warnings in either symbols or non-English languages if it was foreseeable that its product would be used by unskilled or semiskilled workers, who often cannot read English).

155. See Earle & Bushner, *supra* note 113, at 330.

156. See *id.*

157. See *id.*

158. Ancheta, *supra* note 95, at 305.

159. Gronke & Galanes-Rosenbaum, *supra* note 117, at 262-64.

160. IDEA, *supra* note 140, at 71.

fraud.¹⁶¹ However, the potential for fraud or intimidation would be no greater than it currently is under other forms of voting and voting provisions. For example, the voting scenario established by the amended section 208 is already in practice for the blind, disabled, and illiterate and has proven effective.¹⁶² Furthermore, in the case of non-precinct voting, many votes are cast with the help of others and without supervision.¹⁶³ The proposed section 208 amendment minimizes assistants' potential for intimidation by prohibiting "the voter's employer or agent of that employer or officer or agent of the voter's union" from entering the booth with the voter.¹⁶⁴ Because LEP voters can choose an assistant with whom they are comfortable, coercion or undue influence is less likely to occur. The section 208 amendment takes the available precautions to ensure that allowing LEP voters to bring a trusted and chosen translator into the voting booth will not undermine the autonomy of the voting process.

4. *Loss of Anonymity*

Some critics argue that having unofficial persons other than voters in voting booths could result in embarrassment and a loss of anonymity, independence, and dignity due to the extra attention of having assistance.¹⁶⁵ However, when a poll worker assists a voter, it removes discretion from the process and, as a result, voters who need assistance choose to stay home and not vote.¹⁶⁶ For example, in *Berks County*, Hispanic voters stated that poll workers' attitudes made them "uncomfortable . . . and discourage[d] them from voting."¹⁶⁷ The expansion of section 208 would actually increase anonymity and dignity while decreasing embarrassment. Because the assistant would be a person whom the LEP voter chooses, the voter is likely to be more comfortable with that person and less likely to feel embarrassment or a loss of dignity. Additionally, as mentioned above, this amendment does not require the LEP voter or his or her assistant to report that the assistance took place. Rather, the amendment only takes precautions to ensure that the assistant was not a party prohibited from assisting that particular voter, such as the voter's employer. Consequently, it allows for more privacy and anonymity than most of the existing state provisions, which at a minimum require assistants to identify themselves.¹⁶⁸

161. *Id.* at 74.

162. *See* 42 U.S.C. § 1973aa-6 (2006).

163. Gronke & Galanes-Rosenbaum, *supra* note 117, at 263-68.

164. *See* proposed amendment *supra* Section I.

165. Earle & Bushner, *supra* note 113, at 328.

166. *Id.*

167. *United States v. Berks County*, 277 F. Supp. 2d 570, 576 (E.D. Pa. 2003).

168. *See* Benson, *supra* note 36, at 303 n.290.

IV. CONCLUSION

In conclusion, the current VRA language provisions are inadequate to protect the needs of all LEP American citizens; thus, section 208 should be extended to allow LEP voters to bring a translator of their choice with them into the voting booth. The benefits of amending section 208 far outweigh any disadvantages. Through the use of translators, all minority languages can be represented, resulting in increased minority representation. The amendment would also increase acceptance and tolerance of LEP citizens by fostering goodwill and creating a symbol of physical inclusion in the electoral process.¹⁶⁹ Additionally, the amendment places the responsibility of translation on voters, thereby empowering LEP American citizens and eliminating staffing costs in the electoral process. Finally, the government already supports LEP assistance in other processes, so extending LEP assistance to the voting process promotes the government's existing work while helping assimilate LEP American citizens into the culture of the United States. The amended section 208 will result in greater participation and representation of LEP American citizens, while ensuring that the millions of LEP American citizens like Franz will always have a voice in the electoral process.

169. *See id.* at 275.